



STATE OF NEW JERSEY

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

In the Matter of E.R., Department of
Children and Families

Discrimination Appeal

CSC Docket No. 2017-2773

ISSUED: APRIL 6, 2018

(HS)

E.R., a Family Service Specialist 1 with the Department of Children and Families (DCF), represented by Sally A. Sattan, Esq., appeals the determination of the Director, Office of Administration, which found that the appellant failed to present sufficient evidence to support a finding that she had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

The appellant filed a complaint with the Office of Equal Employment Opportunity and Affirmative Action (EEO/AA) alleging discrimination on the bases of disability and retaliation against A.P., a former Supervising Family Service Specialist 2;¹ J.F., Supervising Family Service Specialist 1; K.L., a member of the Senior Executive Service (SES); M.K., Manager 3, Human Resources; and H.Z., a member of the SES. The appellant made the following allegations. The ADA Unit prolonged her leave of absence from March 16, 2015 to April 24, 2015² and caused her hardship as a result, did not offer her an immediate accommodation to a position, and denied her a parking accommodation. She was not officially trained in the Litigation Specialist position and A.P. did not support her in this position. A.P. denied her overtime request to timely complete her work, increased her workload, and assessed her Performance Assessment Review (PAR) in a discriminatory and

¹ A.P. separated from State service effective January 6, 2017.

² The appellant notes that the final letter of determination inaccurately states this time period as March 16, 2016 to April 24, 2016. However, the Civil Service Commission is not persuaded by the appellant's contention that this apparent typographical error demonstrates an inadequate and ineffective investigation.

negative manner. She was humiliated by A.P.'s instructions to have her work reviewed by subordinate staff in the Litigation Unit. J.F. targeted the appellant by changing the lunch hours in the Litigation Unit. J.F. offended the appellant when she sent a text instructing the appellant to take a call from the courts and when she inquired why the appellant did not attend the "Administrative Day" office function. J.F. influenced staff in the Litigation Unit not to converse with the appellant. K.L. attempted to discipline her for entering an employee's office without authorization, forced her to work in havoc conditions in the office, and failed to assist the ADA Unit with her request for a parking accommodation. She was not selected for the Resource Development Specialist position because H.Z. and K.L. are friends who talk, the negative PAR she submitted to be considered for the position, and the limp she walked with at the time of the interview. The appellant alleged that the preceding incidents took place as a result of her disability, her being out of the office on medical leave, her receipt of an ADA accommodation to the Litigation Specialist position and as retaliation for reporting workplace discrimination.

In response, the EEO/AA conducted an investigation and issued its final letter of determination in February 2017. The EEO/AA initially noted that it was the ADA Unit's obligation to find a reasonable accommodation for DCF staff with appropriate medical documentation and that employees in that unit do not express bias for any employee over another but follow the ADA rules and regulations.

As a result of the investigation, it was found that the appellant was accommodated by the ADA Unit accordingly with an available and suitable position in her division Local Office (LO) on April 13, 2015. There was no evidence that her workload increased or that she did not receive support from A.P. in the Litigation Unit. The appellant and A.P. discussed the appellant's concerns about her caseload and A.P. offered her assistance to direct the appellant to manage her cases. The appellant was directed to a subordinate in the Litigation Unit, a paralegal, because that employee had the experience and knowledge to assist the appellant as the appellant was new to the unit. There was no official training to be provided for the Litigation Specialist position, the training was on-the-job, and an employee in the position was expected to cover the Court Liaison in his or her absence. Some of the appellant's overtime requests were denied because her supervisor believed the work could have been completed during the regular seven-hour workday. The appellant passed her interim PAR for the period of September 1, 2015 to August 31, 2016, although she received a score of "1" for timeliness. The appellant's score was justified based on performance, and she was given the opportunity to appeal her PAR if she disagreed. Directions from K.L. were sent to staff via e-mail on May 2, 2016 regarding the construction in the office prior to the appellant's request to move her workstation away from the area. It was reported that the appellant entered an office of the Administrative Assistant (AA) without authorization, and K.L. approached her due to the concern that other employees' confidential information

could be found in that office. The appellant was instructed not to enter the office of the AA when she is out, and no corrective or disciplinary action was taken.

The investigation revealed that the Court Liaison position was not available to offer as an accommodation upon the appellant's return to work on March 13, 2015. However, the appellant did receive a Litigation Specialist position as an accommodation. The appellant was not selected for the Resource Development Specialist position due to her scores on the interview process conducted by a three-person panel, which included H.Z. The EEO/AA noted that the candidate with the highest score was selected.

The EEO/AA further stated that the appellant's most recent addendum to her retaliation complaint, on November 9, 2016, regarding an employee who may have received an accommodation by the LO would not be investigated. The EEO/AA stated that every accommodation request is unique and handled on a case-by-case basis. However, there was no record that this individual even made a request to the ADA Unit or received an accommodation. The EEO/AA did not substantiate a State Policy violation by any of the respondents.

On appeal to the Civil Service Commission (Commission), the appellant presents the following narrative and arguments in support of her claim that the appointing authority failed to accommodate her and engage in an interactive process. In or about January 2015, she was cleared to return to work with restrictions that included that she be primarily sedentary, after knee surgery. At that time, there was an opening for a Court Liaison in her office. She requested reassignment to the Court Liaison position as it satisfied her medical restrictions, she met the position requirements and she had received prior training for the position. She claims that the appointing authority initially denied her the opportunity to interview for the Court Liaison position, and when she was finally afforded an interview, too much time had elapsed. The ADA Unit denied her request for the Court Liaison position and instead informed her that she could resign, accept a demotion, or work a second shift position in Trenton. The appellant maintains that this alternate position was not a reasonable accommodation as it would have required her to use her right leg and drive an hour and a half each way from her home in northern New Jersey to Trenton, which was contrary to her medical restrictions. The Court Liaison position was filled by an employee with "less experience" and "fewer qualifications." When the appellant asked why she did not get the Court Liaison position, she was told it was because she was on medical leave. The appellant contends this was a pretext for discrimination as she was not on medical leave and was medically cleared to return to work at the time of the appointment. Despite her medical clearance to return to work in January 2015, she was not permitted to return to work until April 13, 2015. Thus, from January 13, 2015 to April 13, 2015, she was forced to unnecessarily exhaust her federal Family and Medical Leave Act (FMLA) leave and paid time off and lose her pension service

credits. Thus, the ADA Unit's failure to reassign her to the Court Liaison position was discriminatory and in violation of the State Policy.

Further, the appellant argues that the ADA Unit's failure to restore her employment in January 2015 when she was medically cleared to return to work was a violation of her rights under the State Policy. On March 13, 2015, she returned to work because she received letters from the appointing authority that threatened her with termination if she did not return to work as scheduled. The appellant sat in the office for most of that day before receiving a call from the ADA Unit, which stated that there was no available accommodation for her in her office. She maintains that all of this occurred while the Court Liaison position remained available, and no one from the ADA Unit engaged in an interactive discussion with her to discuss an accommodation that could be provided. The appellant claims she was thus "forced" to return to an unpaid leave status, which required that she pay the full premium for her costly health insurance. For several weeks thereafter, the appellant continued to press the ADA Unit for a reasonable accommodation since the unit insisted that the only available options were the Trenton position, a demotion or resignation. Finally, on April 13, 2015, the appellant was "allowed" to return to work in the position of Litigation Specialist at her regular office location. The qualifications for this position sharply contrasted with those for the position of Court Liaison. The appellant asserts that although she was denied the Court Liaison position, she was asked to cover that position in the Court Liaison's absence, and she therefore had the requisite skill level for the Court Liaison position.

The appellant presents numerous examples in support of her claim that, since her return to work on April 13, 2015, she has been subjected to repeated acts of retaliation, hostility and humiliation as a result of her accommodation request and subsequent disability discrimination complaints, including those raised in her complaint. For example, she claims that A.P. and J.F. made her cover the Court Liaison position so that it interfered with her ability to carry out her Litigation Specialist duties, on four dates. Although two people who were not Litigation Specialists had covered the Court Liaison position before April 2015, J.F. advised her that the Litigation Specialist was the only person who covered the Court Liaison position. However, the appellant was later advised that two other employees would rotate the responsibility to cover for the position. She maintains that J.F. also denied the appellant overtime or gave her a difficult time about working overtime. In addition, the appellant argues that A.P. did not assign cases equitably during January 2016, when the appellant was out for several working days due to surgeries.

The appellant reiterates her claim that she was denied a reasonable accommodation request for a closer parking spot. On three occasions, the appellant asserts she submitted medical documentation and pictures of three available

parking spots. She claims she was told that the spaces did not belong to the appointing authority, but she asserts that her division had rented these spaces. The appellant notes that although she was given a “closer” parking space on July 22, 2016, three division employees were assigned to even “closer” spaces next to the door, which she was denied for several months.

Additionally, the appellant claims that J.F. and A.P. unfairly assessed her with respect to her February 26, 2016 interim PAR and December 21, 2016 close-out PAR.³ In this regard, she maintains that J.F. and A.P. did not meet with her to discuss them. The appellant claims she has not been allowed to see the data utilized to formulate the evaluations and that she has countering data.⁴ The appellant also maintains that her interim PAR was used to deny her the Resource Development Specialist position.

The appellant reiterates that in October 2016, she learned that a pregnant coworker, K.P., a former Family Service Specialist 1,⁵ was being accommodated in the appellant’s unit. The appellant asserts that there were no available positions in the Litigation Unit at that time where K.P. could have been accommodated, yet K.P.’s name was added to the Litigation Unit assignment rotation. Several weeks later, during a unit meeting, A.P. announced that K.P. was being accommodated elsewhere in the office. Eventually, she learned that K.P. was assigned to deskwork and was not being sent into the field due to her condition. The appellant argues that although the EEO/AA indicates that K.P. did not make a formal request for an accommodation, K.P. was given an “unofficial accommodation.” However, she was sent home on an unpaid leave under similar circumstances.

The appellant adds that on January 25, 2017, J.F. assigned her to a case with a lengthy division history to prepare in one day. Another issue was that these types of emergency assignments are assigned immediately because there are only two days to get them to court. She claims that J.F. assigned the case to her because she had used a sick day on January 24, 2017.

The appellant also complains that the EEO/AA investigator advised her that she would not be allowed to have an attorney present for their meeting but that the appointing authority would be allowed to have a representative available.

In support of her appeal, the appellant submits various exhibits. The appellant also requests the following remedies: reassignment to one of two LOs in northern New Jersey; for the time period January 2015 to April 2015, restoration of FMLA leave improperly applied, pension service credit, COBRA premiums paid,

³ The appellant received an overall rating of “Successful” on both PARs.

⁴ Although the appellant grieved her interim PAR, the DCF Office of Employee Relations denied her grievance.

⁵ K.P separated from State service effective December 11, 2017.

and paid time off that would have accrued; revision of the February 26, 2016 and December 21, 2016 PARs; compensatory damages; and attorneys' fees and costs.

In response, the EEO/AA argues that the appellant has rehashed the allegations from her complaint, which it appropriately investigated and found to be unsubstantiated. It states that it reviewed 14 documents and interviewed five witnesses. The EEO/AA states that at the time the appellant went out on medical leave in November 2014, she was in the functional position of Intake Worker, whose primary duties involved going into the field to investigate reports of child abuse or neglect by conducting interviews and inspections at victims' homes. While on leave, the appellant made a request to the ADA Unit in an effort to return to work earlier. Due to her medical restrictions preventing her performance of the essential functions of an Intake Worker, the ADA Unit advised that it would attempt to place her in a more suitable position but also advised that a suitable position would have to open up for her to be placed in. Thus, the appellant's medical leave was extended while the ADA Unit attempted to reassign the appellant. The ADA Unit offered the appellant the Trenton position, which was in the functional position of State Central Registry Screener, but the appellant declined due to the distance from her home. The appellant returned to work on March 13, 2015 and submitted a medical note with work restrictions. Since these restrictions prevented her from performing the duties of an Intake Worker, the LO advised that she could not return to work in that position. The ADA Unit advised that the appellant would have to continue her medical leave until a suitable position opened up. The appellant was approved for an extended leave of absence from March 16, 2015 to April 24, 2015, the date her medical restrictions were expected to be lifted. As the appellant had exhausted her available paid leave, she was placed on a non-paid leave status. Eventually, the Litigation Specialist functional position in the Litigation Unit of the appellant's LO opened up, and the appellant accepted a reassignment to that position effective April 13, 2015. The EEO/AA notes that the appellant did apply for the Court Liaison position in her LO's Litigation Unit. The appellant was scheduled for an interview but was told by the AA that since she was out on medical leave, she could not come to the LO to interview. However, once the appellant advised the AA that she had been approved for an ADA accommodation, the LO advised she could come to the office. The appellant interviewed for the Court Liaison position but was not offered the job. An employee who was previously the Litigation Specialist at the LO was offered the position, and that employee accepted. The appellant was offered and accepted the Litigation Specialist position that opened up.

The EEO/AA states that although the appellant alleged that the ADA Unit did not accommodate her disability, it found that the appellant received her requested accommodation through a reassignment to the Litigation Specialist position. While she was not placed in that position instantly, the investigation revealed that the ADA Unit engaged in an interactive process with the appellant while she remained on medical leave, offering her positions as they opened up.

Once the Litigation Specialist position at the appellant's LO became vacant in April 2015, the ADA Unit offered to place her in that position, and she accepted. The EEO/AA states that the Court Liaison position at her LO was not available for the appellant to be placed into in March 2015 as she wanted. Therefore, the EEO/AA maintains that it did not substantiate the allegation that the ADA Unit unnecessarily prolonged her leave of absence by not placing her in that position and that the appellant's contention that she did not get the Court Liaison position because she was on medical leave is inaccurate. The investigation further revealed, based on the appellant's own interview statement, that the appellant had applied and interviewed for the Court Liaison position but was not offered the position. The EEO/AA also states that its investigation revealed that the ADA Unit engaged in an interactive process to accommodate the appellant's request for a closer parking space. The appellant had asked to switch parking spaces with other employees who had parking spaces closer to the building, something the ADA Unit lacked the authority to do. However, the ADA Unit advised the appellant that she could utilize the designated handicap parking spaces at the LO that are available on a first come, first serve basis. Eventually, the LO provided the appellant a permanent closer parking space previously held by another employee once it opened up in July 2016.

The EEO/AA maintains that its investigation did not substantiate any State Policy violations by A.P. Having reviewed the appellant's interim PAR, it did not find that A.P.'s evaluation raised any inference of discrimination or retaliation. A.P. gave the appellant a satisfactory evaluation and only provided her with one unsatisfactory score for timeliness. This PAR was only an interim evaluation and the appellant had the ability to improve her performance for the final evaluation. Furthermore, there was no evidence that A.P. unfairly denied the appellant overtime. A.P. indicated that she approves overtime based on what she feels is a reasonable time to complete a task. The only instance of A.P.'s outright denial of overtime to the appellant found by the EEO/AA was an instance where the appellant requested seven hours of overtime at once, which A.P. could not approve. The investigation also did not substantiate that A.P. assigned the appellant additional work. A.P. indicated that she made sure not to assign the appellant too many cases in the beginning so that the appellant's transition into the Litigation Unit would be easier. A.P. further indicated that she distributed cases to her staff evenly. There was no formal training for the Litigation Specialist position; however, A.P. has an "open door" policy to answer staff questions. The EEO/AA also found no evidence that A.P. directed the appellant to report to a paralegal in a lower title. Rather, based on this paralegal's experience in the Litigation Unit, A.P. assigned the paralegal to review the Litigation Unit staff's work while A.P. was out on leave. With respect to the appellant being asked to cover for the Court Liaison, the investigation revealed that the Litigation Specialist is traditionally the backup for the Court Liaison because they are both in the Litigation Unit. However, the appellant was taken off backup duty because her medical restrictions made it

difficult for her to perform the Court Liaison duties, which include climbing, lifting and walking.

The EEO/AA states that its investigation also did not substantiate the allegations of retaliation by J.F. J.F. was unaware of the appellant's disability and did not observe her using a cane or limping. J.F. confirmed denying some of the appellant's overtime requests but not due to her disability or complaint. J.F. denied some of the appellant's overtime requests because the appellant was not completing her assignments due to chatting too much with other staff, and J.F. received complaints from other staff. J.F. advised the appellant to refrain from chatting to get her work done on time. J.F. confirmed asking the appellant why she did not attend a function she donated to, but not in a hostile manner. J.F. only asked because she thought the appellant had wanted to attend since the appellant had donated. While the investigation revealed that J.F. changed the lunch hours of her staff, this was not an action directed at the appellant specifically but rather to the entire Litigation Unit to prevent abuse of the lunch hour. J.F. sent the directive by e-mail to the entire staff, and the new lunch hour policy was applied across the board for all staff. J.F. confirmed texting the appellant about taking calls from the court in response to the appellant's refusing to take a call because she was moving her work station to another location. J.F. advised that calls from the court are important to the Litigation Unit. J.F. stated that she may have asked the appellant to complete an assignment for someone else, but this would have been a case where the other employee was absent and the assignment had a pending deadline. The EEO/AA also did not substantiate that J.F. influenced the appellant's co-workers to avoid her in an attempt to alienate her. J.F. stated that she may have asked certain employees to refrain from talking to the appellant while the appellant was working, but this was because she did not want the appellant to be distracted.

The EEO/AA states that it did not substantiate the allegations of discrimination and retaliation by K.L. The investigation revealed that K.L. had the appellant come to his office to advise her that she should not put her leave requests in the AA's inbox while the AA is out of work as a precaution against employees' viewing their co-workers' confidential personnel and medical information. K.L.'s directive was based on office protocol that had been established at the LO when the AA is out of the office. Even though K.L. advised that the incident could warrant disciplinary action, no disciplinary or corrective action was taken. It was also determined that K.L. had sufficiently notified the LO staff about the office construction and had advised them that they had the option to move their work stations before the appellant asked to be moved. In addition, both J.F. and K.L. had sent e-mails to the building office manager in an attempt to secure a closer parking space for the appellant.

The EEO/AA contends that the appellant's complaints concerning the actions of A.P., J.F. and K.L. are disagreements about general workplace matters that do

not rise to the level of discriminatory or retaliatory acts that violate the State Policy.

The EEO/AA also did not substantiate the allegation that the appellant was not offered the Resource Development Specialist position due to discriminatory or retaliatory reasons. The investigator obtained and reviewed the selection records, which revealed that the appellant scored lower on her interview than other applicants and thus was not selected. Furthermore, H.Z. was only one of the three interview panelists.

The EEO/AA further notes that it did not investigate the appellant's allegation that K.P. received an immediate accommodation because the allegation was speculative. The EEO/AA maintains that each accommodation request is unique and handled on a case-by-case basis based on the requesting employee's condition and the operational needs of the appointing authority at the time.

The EEO/AA disputes that the appellant was sent letters that threatened termination if she did not return to work. The letters she received from human resources that extended her leaves of absence simply notified her that, pursuant to *N.J.A.C.* 4A:2-6.2, an employee who does not report back to work within five consecutive business days of the scheduled return date is subject to disciplinary action for job abandonment. The EEO/AA maintains that this language was clearly for the purpose of notifying the appellant in advance that she should request additional leave or other accommodations if she would not be medically cleared to return by her scheduled return date of March 13, 2015.

The EEO/AA also did not substantiate the appellant's claim that she suffered retaliation in January 2017 when she was allegedly assigned an increased workload. It learned that work at the LO was distributed to the staff, including the appellant, pursuant to a rotation list and that the appellant's current supervisor was unaware of her EEO/AA complaint.

As to the appellant's complaint that she was not permitted to have an attorney present for her interview with the EEO/AA, the EEO/AA states that an employee has no constitutional right to an attorney during an administrative investigation. *See In the Matter of Comprehensive Investigation of School Dist. of Newark*, 276 *N.J. Super.* 354 (App. Div. 1994).

Based on the above, the EEO/AA maintains that the appellant has not supported her claims of disability discrimination and retaliation. It also contends that her requested remedies are not available in the instant appeal under *N.J.A.C.* 4A:2-1.

In reply, the appellant argues that the EEO/AA's response was untimely as it was submitted more than 10 days after its receipt of her appeal. With respect to the merits, the appellant notes that the February 2017 determination letter, which she refers to as the "[i]nvestigative [r]eport," does not reference any document and argues that this is evidence that the investigator failed to consider all documentary evidence she submitted. She also reiterates her contention that she was improperly denied the Court Liaison position as a reasonable accommodation pursuant to *N.J.A.C.* 13:13-2.5(b) and notes that her doctor had recommended that position as an accommodation for her. The appellant claims that the appointing authority thus ignored the only pertinent medical evidence. She contends that the EEO/AA's assertion that the Court Liaison position was not available for the appellant on March 13, 2015 lacks credibility. Specifically, the appellant states that only eight business days later on March 25, 2015, H.S., Family Service Specialist 1, was reassigned to the Court Liaison position. However, the appointing authority did not explain why the position was unavailable for her but available for another employee. Further, H.S. suffers from no known disability and did not require the position as an accommodation. The appellant maintains that the appointing authority's blanket unexplained refusal to offer her the position evidences its discriminatory and retaliatory animus. She adds that a more thorough investigation would have revealed that the appointing authority offered no evidence that it would have been an undue hardship to reassign her to the Court Liaison position. Thus, she maintains that she could have been reasonably accommodated on December 31, 2014, when the Court Liaison position became vacant, but for the appointing authority's lack of good faith. In addition, the appellant argues that it is immaterial that she was allowed to interview for the Court Liaison position as she was reassigned to the Litigation Specialist position, H.S.'s former position, without an interview.⁶

In reply, the EEO/AA argues that the appellant incorrectly asserts that the investigator failed to review documents provided and that the investigative report makes no mention of these documents. It states that the appellant incorrectly refers to the February 2017 determination letter as the investigative report; however, Civil Service regulations make clear that the investigative report and the final letter of determination are separate documents. *See N.J.A.C.* 4A:7-3.2(j) and (l). In January 2017, the EEO/AA issued its investigative report, which identified the numerous documents that were reviewed during the investigation. Thus, it maintains that it did review pertinent documents. Regarding the issue of the Court Liaison position, the EEO/AA emphasizes that in evaluating an employer's duties to

⁶ The appellant also notes that on October 18, 2017, she requested reassignment on the basis of allegations of discrimination and retaliation. She also argues that the EEO/AA's position that she could only be reassigned to a Litigation Unit in another LO in the functional position of Litigation Specialist seems to violate the appointing authority's duty to accommodate her medical limitations. The Commission declines to address these issues as the alleged incidents postdate the EEO/AA's determination and the record indicates that the appellant is preparing to file a new complaint with the EEO/AA.

provide a reasonable accommodation to employees with disabilities under *N.J.A.C.* 13:13-2.5, New Jersey courts have held that

the phrase “reasonable accommodation” refers to the duty of an employer to attempt to accommodate the *physical disability* of the employee, *not* to a duty on the part of the employer to acquiesce to the disabled employee’s requests for certain benefits or remuneration.

Jones v. Aluminum Shapes, Inc., 339 *N.J. Super.* 412, 426 (App. Div. 2001). Here, the appellant was reassigned to the Litigation Specialist position effective April 13, 2015, which allowed her to continue to work at her LO with her medical restrictions. Thus, the EEO/AA maintains that she was granted a reasonable accommodation and the fact that she did not receive a specific assignment she wanted does not establish a failure on the appointing authority’s part to provide her with a reasonable accommodation. Furthermore, that H.S. was reassigned to the Court Liaison position on March 25, 2015 does not evidence that the appellant was improperly denied an accommodation to be reassigned to that same position when she attempted to return to work on March 13, 2015. H.S. had been selected to fill the Court Liaison position on March 2, 2017, prior to appellant’s attempt to return to work on March 13, 2015. The investigative report provides that the investigator reviewed the DCF vacancy approval report for that timeframe, and the investigation revealed that the appellant’s LO had no vacant, approved-to-fill positions available to place the appellant in at that time. The EEO/AA also contends that the appellant’s own documentation submitted in this appeal shows that she had failed to provide any medical information supporting a reassignment to the Court Liaison position until March 24, 2015, after the appointing authority had selected H.S. to fill the position. The prior medical notes simply stated that the appellant was restricted from performing the essential functions of the title of Family Service Specialist 1 and should be primarily sedentary. Therefore, the appellant’s claim that her request for a reassignment to the Court Liaison position was supported by her doctor’s recommendation prior to March 13, 2015, is not supported by her own submissions.

In reply, the appellant argues that the EEO/AA’s reply should be disregarded as it is “another bite at the apple to make additional arguments.”

CONCLUSION

Initially, it is noted that the appellant contends that the EEO/AA provided an untimely response and that its reply should be disregarded. However, there is no jurisdictional statutory timeline within which a party is required to respond to an appeal. *See e.g., In the Matter of Michael Compton* (MSB, decided May 18, 2005). In addition, in order for the Commission to make a reasoned decision in a matter, it must review a complete record. *See e.g., In the Matter of James Burke* (MSB,

decided June 22, 2005). Moreover, the appellant had the opportunity to reply to the EEO/AA's submissions. As such, there is no basis to disregard any of the EEO/AA's submissions.

The Americans with Disabilities Act (ADA) is a federal statute designed to eliminate discrimination against individuals with disabilities. 42 U.S.C.A. § 12101. State courts have concurrent jurisdiction with federal courts over ADA claims; however, existence of such concurrent jurisdiction does not alter the fact that ADA actions are federal question cases. *Jones v. Illinois Cent. R. Co.*, 859 F. Supp. 1144 (N.D. Ill. 1994). Nowhere in the ADA or in relevant case law is jurisdiction over ADA claims extended to State agencies. However, the Commission may review ADA issues collaterally, when they are implicated in an appeal properly before the Commission, such as in a disciplinary action or in a discrimination appeal. See *Matter of Allen*, 262 N.J. Super. 438, 444 (App. Div. 1993); *In the Matter of John Soden* (MSB, decided September 10, 2002) (noting that jurisdiction was proper when the ADA was implicated as a defense to a disciplinary removal properly before the former Merit System Board); *In the Matter of Michael Giannetta* (MSB, decided May 23, 2000) (the former Merit System Board could apply the ADA in deciding an issue concerning removal from an eligible list). In regard to discrimination matters, N.J.A.C. 4A:7-3.2(m) allows employees in the State career, unclassified and senior executive services who claim unlawful discrimination under the State Policy, codified at N.J.A.C. 4A:7-3.1 *et seq.*, to appeal such action to the Commission using the procedures set forth in N.J.A.C. 4A:7-3.2. Moreover, it is a violation of the State Policy to engage in any employment practice or procedure that treats an individual less favorably based upon the individual's race, creed, color, national origin, nationality, ancestry, age, sex/gender (including pregnancy), marital status, civil union status, domestic partnership status, familial status, religion, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States, or disability. See N.J.A.C. 4A:7-3.1(a)3; *In the Matter of Michael Tidswell* (MSB, decided August 9, 2006) (Appellant's request for a reasonable accommodation remanded to the appointing authority for further investigation regarding possible violations of the State Policy).

Under the ADA, the term "reasonable accommodation" means: (1) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; (2) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or (3) modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. A reasonable accommodation may include, but is not limited to: (1)

making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (2) job restructuring: part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training, materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. *See 29 C.F.R. § 1630.2(o)* (1999).

Further, the ADA requires that, where an individual's functional limitation impedes job performance, an employer must take steps to reasonably accommodate, and thus help overcome the particular impediment, unless to do so would impose undue hardship on the employer. *See 29 C.F.R. § 1630.2(p)*. Such accommodations usually take the form of adjustments to the way a job customarily is performed, or to the work environment itself. This process of identifying whether, and to what extent, a reasonable accommodation is required should be flexible and involve both the employer and the individual with the disability. No specific form of accommodation is guaranteed for all individuals with a particular disability. Rather, an accommodation must be tailored to match the needs of the disabled individual with the needs of the job's essential function. The ADA does not provide the "correct" answer for each employment decision concerning an individual with a disability. Instead, the ADA simply establishes parameters to guide employers in how to consider, and to take into account, the disabling condition involved. *See 29 C.F.R. § 1630.2(o)* and *29 C.F.R. § 1630.9*.

It is noted that in providing an accommodation, an employer does not have to eliminate an essential function or fundamental duty of the position. This is because a person with a disability who is unable to perform the essential functions, with or without a reasonable accommodation, is not a "qualified" individual with a disability within the meaning of the ADA. *See 29 C.F.R. 1630.2. See also, Ensslin v. Township of North Bergen, 275 N.J. Super. 352, 361 (App. Div. 1994), cert. denied, 142 N.J. 446 (1995)* (No reasonable accommodation of Police Sergeant's disability would permit him to perform essential functions of job, and thus the township did not violate the New Jersey Law Against Discrimination by terminating the Sergeant after he was rendered paraplegic in skiing accident); *Albertson's Inc. v. Kirkingburg, 527 U.S. 555 (1999)* (Truck driver with monocular vision who failed to meet the Department of Transportation's visual acuity standards was not a "qualified" individual with a disability under the ADA).

Additionally, retaliation against any employee who alleges that she or he was the victim of discrimination/harassment, provides information in the course of an investigation into claims of discrimination/harassment in the workplace, or opposes a discriminatory practice, is prohibited by the State Policy. No employee bringing a complaint, providing information for an investigation, or testifying in any proceeding under the State Policy shall be subjected to adverse employment

consequences based upon such involvement or be the subject of other retaliation. *See N.J.A.C. 4A:7-3.1(h)*. The State Policy is a zero tolerance policy. *See N.J.A.C. 4A:7-3.1(a)*. Moreover, the appellant shall have the burden of proof in all discrimination appeals. *See N.J.A.C. 4A:7-3.2(m)4*.

The Commission has conducted a review of the record in this matter and finds that an adequate investigation was conducted, that the relevant parties in this matter were interviewed and that the investigation failed to establish that the appellant was discriminated against or harassed in violation of the State Policy. The EEO/AA appropriately analyzed the available documents and interviewed several witnesses in investigating the appellant's complaint and concluded that there was no violation of the State Policy based on the appellant's disability or retaliation. The record reflects that the appellant was approved for a medical leave of absence in November 2014 and later offered a State Central Registry Screener position as an accommodation, which she declined due to the distance from her home. Ultimately, she was offered and accepted a reassignment to a Litigation Specialist position in her office, effective April 13, 2015, that accommodated her needs, among which were that she be primarily sedentary. She is not required to perform the fieldwork required of her previous Intake Worker position. The appellant submits that she should have received a reassignment to a Court Liaison position earlier that would have obviated the need to extend her leave of absence. However, the record reflects that the appellant applied and interviewed for the Court Liaison position but was not offered that position. An employee who had been serving in the Litigation Specialist position was offered the Court Liaison position, that employee accepted, and the appellant accepted the Litigation Specialist position that opened up. Moreover, the appellant did not provide documentation that her doctor supported her reassignment to the Court Liaison position until March 24, 2015, which was after both the completion of the selection process and the appellant's attempt to return to work on March 13, 2015. There is no evidence in the record beyond the appellant's assertions to suggest that the appointing authority denied the appellant the Court Liaison position or extended her leave of absence out of any discriminatory or retaliatory animus. Similarly, there is no evidence in the record to suggest that the appointing authority handled the appellant's request for a closer parking space in a discriminatory or retaliatory manner. She was provided with a closer permanent parking space once one became available. It should be noted that an employee does not necessarily have the right to demand and receive specific accommodations if he or she can still perform the essential functions of her position. *See e.g., In the Matter of Mary V. Powell* (MSB, decided February 20, 2002). In this matter, there is no evidence that the appellant could not perform the essential functions of her Litigation Specialist position. As stated above, the ADA does not provide the correct answer for each employment decision concerning an individual with a disability. Rather, it establishes parameters to guide employers in how to consider, and to take into account, the disabling condition involved. In this case, the appellant has not convinced the

Commission that the appointing authority's actions were outside of the established parameters.

In addition, the appellant's contention that various actions of A.P., J.F. and K.L. were retaliatory is unpersuasive. In this regard, the Commission agrees with the EEO/AA that the appellant's objections represented disagreements over general workplace matters unrelated to any previous accommodation request or disability discrimination complaint. Disagreements between co-workers cannot sustain a violation of the State Policy. *See In the Matter of Aundrea Mason* (MSB, decided June 8, 2005) and *In the Matter of Bobbie Hodges* (MSB, decided February 26, 2003). As to the Resource Development Specialist position, the investigation revealed that the appellant was not selected due to a legitimate business reason, her interview score, rather than a discriminatory or retaliatory reason. The appellant's PARs were similarly not based on discrimination or retaliation. Although the appellant also raised in her complaint an alleged accommodation K.P. received in or about October 2016, the EEO/AA found no record that K.P. even made an accommodation request to the ADA Unit or received an accommodation. On appeal, the appellant notes her belief that an unofficial accommodation was created for K.P. Even assuming this occurred, the appellant provides no substantive evidence that such an accommodation was retaliatory against the appellant. In this regard, the EEO/AA correctly notes that each accommodation request is unique and handled on a case-by-case basis based on the employee's condition and the employer's operational needs at the time.

Further, the appellant was not entitled to have an attorney present for her meeting with the EEO/AA investigator. *See Mira Shah v. Union County Human Services*, Docket No. A-2772-99T2 (App. Div. October 8, 2004) (Neither the United States nor the New Jersey Constitution guarantee a right to counsel to parties in civil or administrative proceedings). *See also, David v. Strelecki*, 51 N.J. 563 (1968, cert. denied, 393 U.S. 933 (1968) (“[I]t is equally clear that the special rules attaching to criminal proceedings do not extend to administrative hearings”). Accordingly, the investigation was thorough and impartial, and no substantive basis to disturb the EEO/AA's determination has been presented.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF APRIL, 2018



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